16 Am. Jur. 2d Constitutional Law § 108

American Jurisprudence, Second Edition | February 2021 Update

Constitutional Law

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V. Determination of Constitutionality of Legislation

A. Power to Declare Legislation Void

1. In General

§ 108. Judicial power to determine the constitutionality of legislation, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 955, 961, 963, 969

Forms

Forms relating to constitutionality of a statute, see Am. Jur. Pleading and Practice Forms, Constitutional Law [Westlaw®(r) Search Query]

Although the doctrine of judicial supremacy was not established without dispute, it is now a settled principle[1] of the American system of constitutional law that the courts have inherent authority to determine whether statutes enacted by Congress or a state legislature transcend the limits imposed by the Federal and State Constitutions and to determine whether such laws are or are not constitutional.[2]

Courts, above all else, have a duty to uphold the Constitution,[3] and where a statute is in fact unconstitutional, the court's duty is to declare it invalid,[4] no matter how desirable or beneficial its purposes might be.[5] Likewise, when an Act of Congress is alleged to conflict with the Federal Constitution, it is emphatically the province and duty of the judicial department to say what the law is; that duty will sometimes involve the resolution of litigation challenging the constitutional authority of one of the three branches, but courts cannot avoid their responsibility merely because the issues have political implications.[6]

Observation:

The goal of constitutional adjudication is a simple one: it is to hold the true balance between what the Constitution puts beyond the reach of the democratic process and that which it does not.[7]

The constitutionality of a statute or ordinance is a question of law.[8] There is a strong presumption that constitutional claims are judicially reviewable in some forum.[9] It is within the special province and duty of the courts[10] to say what the law is[11] and to determine whether a statute or ordinance[12] is constitutional, and no express constitutional authority for such action is necessary.[13] It is a necessary consequence of our system of government.[14] Clearly, the assent of the executive branch to a bill which contains a provision contrary to the Constitution does not shield it from judicial review.[15]

A court applies its independent judgment in determining whether a statute violates the constitution.[16] Extrinsic facts are not needed to determine whether a statute is unconstitutional on its face.[17] When assessing a challenge to the constitutionality of legislation, a court's duty is to determine whether the General Assembly has complied with the constitution; if constitutional requirements are met, the wisdom of the legislation is a question for the General Assembly.[18]

Where state constitutions contain no specific provisions confining, limiting, and making subject to restrictions and qualifications, the power of the courts to declare statutes unconstitutional, the judicial power is essentially unlimited, but a court, having no general supervision[19] or general veto power over legislation, may not legitimately void a law merely because it does not like it or regards it as impracticable.[20] A court's function, when the constitutionality of a statute is put at issue, is limited to a determination of the validity or invalidity of the legislative provision.[21]

Observation:

Although a state court may apply a standard of review more stringent than the federal "rational basis" test as a matter of state law under the state's equivalent to the equal protection or due process clauses of the 14th Amendment, when a state court reviews state legislation challenged as violative of the 14th Amendment, it is not free to impose greater restrictions as a matter of federal constitutional law than the United States Supreme Court has imposed.[22]

States, by their constitutions and statutes, can restrict the power of particular state courts to declare statutes invalid as violative of the Federal Constitution, so long as a reasonable opportunity exists somewhere in the state system to raise the federal constitutional issues.[23]

CUMULATIVE SUPPLEMENT

Cases:

A facial challenge to a statute is purely a question of law because the violation, if any, occurs at the point of enactment by virtue of the Legislative Assembly enacting a law prohibited by the constitution; a violation that occurs at the time of enactment does not depend on any facts or circumstances arising later. Sorum v. State, 2020 ND 175, 947 N.W.2d 382 (N.D. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Marbury v. Madison, 5 U.S. 137, 2 L. Ed. 60, 1803 WL 893 (1803).

2 U.S. v. Butler, 297 U.S. 1, 56 S. Ct. 312, 80 L. Ed. 477, 102 A.L.R. 914 (1936); Marbury v. Madison, 5 U.S. 137, 2 L. Ed. 60, 1803 WL 893 (1803).

3 Painter v. Shalala, 97 F.3d 1351 (10th Cir. 1996).

4 Satterfield v. Crown Cork & Seal Co., Inc., 268 S.W.3d 190 (Tex. App. Austin 2008).

5 Wilson v. Department of Revenue, 169 Ill. 2d 306, 214 Ill. Dec. 849, 662 N.E.2d 415 (1996).

6 Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 132 S. Ct. 1421, 182 L. Ed. 2d 423, 75 A.L.R. Fed. 2d 637 (2012).

7 Webster v. Reproductive Health Services, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989).

8 Lochsa Falls, L.L.C. v. State, 147 Idaho 232, 207 P.3d 963 (2009); Rohlfs v. Klemenhagen, LLC, 2009 MT 440, 354 Mont. 133, 227 P.3d 42 (2009).

9 Riggin v. Office of Senate Fair Employment Practices, 61 F.3d 1563 (Fed. Cir. 1995).

10 Marbury v. Madison, 5 U.S. 137, 2 L. Ed. 60, 1803 WL 893 (1803).
The power to declare an act of the legislature unconstitutional is a judicial power reserved solely to the courts. In re Metropolitan Utilities Dist. of Omaha, 179 Neb. 783, 140 N.W.2d 626 (1966).

11 State ex rel. v. Shumate, 172 Tenn. 451, 113 S.W.2d 381 (1938).
As to judicial functions, generally, see §§ 257, 264.

12 Dade County v. Overstreet, 59 So. 2d 862 (Fla. 1952).
When the validity of a statute is challenged on constitutional grounds, the sole function of the court is to determine whether it transcends the limits of legislative power. State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn., 111 Ohio St. 3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, 214 Ed. Law Rep. 768 (2006).

13 Jones v. Freeman, 1943 OK 322, 193 Okla. 554, 146 P.2d 564 (1943) (overruled on other grounds by, Alexander v. Taylor, 2002 OK 59, 51 P.3d 1204, 114 A.L.R.5th 759 (Okla. 2002)).

14 Marbury v. Madison, 5 U.S. 137, 2 L. Ed. 60, 1803 WL 893 (1803).

15 I.N.S. v. Chadha, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).

16 Doe v. State, 189 P.3d 999 (Alaska 2008).

17 Reading v. Pub. Util. Comm., 109 Ohio St. 3d 193, 2006-Ohio-2181, 846 N.E.2d 840 (2006).

18 Hart v. State, 368 N.C. 122, 774 S.E.2d 281, 320 Ed. Law Rep. 465 (2015).

19 Herlands v. Surpless, 258 A.D. 275, 16 N.Y.S.2d 454 (1st Dep't 1939), order aff'd, 282 N.Y. 647, 26 N.E.2d 800 (1940).

20 Trio Distributor Corp. v. City of Albany, 2 A.D.2d 326, 156 N.Y.S.2d 912 (3d Dep't 1956), judgment rev'd on other grounds, 2 N.Y.2d 690, 163 N.Y.S.2d 585, 143 N.E.2d 329 (1957).

21 In re Assessments for Year 2005 of Certain Real Property Owned by Askins Properties, L.L.C., 2007 OK 25, 161 P.3d 303 (Okla. 2007).

22 Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981).

23 State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County, 281 U.S. 74, 50 S. Ct. 228, 74 L. Ed. 710, 66 A.L.R. 1460 (1930).

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V. Determination of Constitutionality of Legislation

A. Power to Declare Legislation Void

1. In General

§ 109. Limitation on judicial power to determine constitutionality of legislation by statute or rule of practice

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 958, 959, 961

Judicial power to determine the constitutionality of state legislation may be subject to procedural limitations, as where a statute requires that a state's attorney general be served[1] and given an opportunity to be heard in a declaratory judgment proceeding in which a statute, ordinance, or franchise is alleged to be unconstitutional.[2] Such a requirement is considered jurisdictional in some states,[3] but not in others.[4] In this regard, some states require service on the attorney general only in declaratory judgment actions.[5] In any event, the object of the requirement is to assure a fully adversary and complete adjudication of the constitutional issue,[6] and to protect the state and citizens should the parties be indifferent to the outcome of the litigation.[7]

If a rule of practice so requires, a court may also refuse to consider a party's constitutional challenge to a statute where the party has failed to strictly comply with a rule of practice requiring that parties presenting constitutional challenges to statutes must file and serve separate written notices thereof with the state supreme court clerk at the time of filing such parties' briefs, even though the party did file the required notice at the time the party submitted a reply brief.[8]

The jurisdiction of certain courts to hear certain types of cases may also be limited by properly enacted statutes, so long as some type of remedy is provided and so long as the remedy that is provided is adequate. Thus, when confronted with what appears to be a constitutional claim, a tribunal must first determine for itself that it has judicial authority to decide it. As an example, a state has discretion to channel appeals challenging the constitutionality of a tax statute to administrative processes and a tax

court so long as those remedies are adequate, since the Federal Constitution does not require all state courts to hear federal constitutional challenges to the imposition of a state tax.[9]

Where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear[10] to avoid the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.[11] Also, rules of practice limiting judicial determination of constitutional issues which, although weighty, fall short of the status of principles ordained by the Constitution, may be made subject to exceptions where there are weighty countervailing policies.[12] Rules of practice limiting judicial determination of constitutional issues will not be applied where their application would itself have an inhibitory effect on freedom of speech.[13]

Footnotes

1 Osborne v. Bekaert Corp., 97 Ark. App. 147, 245 S.W.3d 185 (2006); Williams v. State, Dept. of Health and Hospitals, 671 So. 2d 899 (La. 1996).
The failure to notify the attorney general of a constitutional challenge to a statute results in the waiver of that issue. In re Penn-Delco School Dist., 903 A.2d 600, 211 Ed. Law Rep. 953 (Pa. Commw. Ct. 2006).
When a challenge to the constitutionality of a statute is involved in an action in which the state is not a party, there must be proof of service on, or notice to, the attorney general. Gina P. v. Stephen S., 33 A.D.3d 412, 824 N.Y.S.2d 619 (1st Dep't 2006).

2 DeVries v. State, 219 Ariz. 314, 198 P.3d 580 (Ct. App. Div. 1 2008).
Notice to the attorney general, when the constitutionality of any statute is challenged on appeal, is required on appeal, as well as at the trial court level. Maxwell Communications v. Webb Publishing Co., 518 N.W.2d 830 (Minn. 1994).

3 Benet v. Com., 253 S.W.3d 528 (Ky. 2008).
Strict compliance with a rule requiring notice to the supreme court clerk that the case involves the constitutionality of a statute is required for the court to address a constitutional claim, regardless of how that constitutional challenge may be characterized. Smith v. Wedekind, 302 Neb. 387, 923 N.W.2d 392 (2019).
A federal district court failed to comply with a statute requiring the district court to notify the state attorney general that it might rule on the constitutionality of a state statute prohibiting the recording of private conversations; no representative of the state was a party to the action challenging the constitutionality of the state statute. Fordyce v. City of Seattle, 55 F.3d 436, 147 A.L.R. Fed. 811 (9th Cir. 1995).
A taxpayer could not challenge the constitutionality of statutes governing the valuation of taxpayer's real property as violative of a state constitutional provision requiring uniform taxation not to exceed the actual value of property, where the taxpayer failed to provide notice of the constitutional challenge to the attorney general. West Two Rivers Ranch v. Pennington County, 1996 SD 70, 549 N.W.2d 683 (S.D. 1996).

4 Vallo v. Gayle Oil Co., Inc., 646 So. 2d 859 (La. 1994).

5 Buchan v. Hobby, 288 Ga. App. 478, 654 S.E.2d 444 (2007).

6 Osborne v. Bekaert Corp., 97 Ark. App. 147, 245 S.W.3d 185 (2006).

7 DeVries v. State, 219 Ariz. 314, 198 P.3d 580 (Ct. App. Div. 1 2008).

8 State v. McDowell, 246 Neb. 692, 522 N.W.2d 738 (1994).

9 State v. Sproles, 672 N.E.2d 1353 (Ind. 1996).

10 Ragbir v. Homan, 923 F.3d 53 (2d Cir. 2019); Collins v. Mnuchin, 938 F.3d 553 (5th Cir. 2019); Helman v. Department of Veterans Affairs, 856 F.3d 920 (Fed. Cir. 2017).

11 Webster v. Doe, 486 U.S. 592, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988).

12 U.S. v. Raines, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960).

13 U.S. v. Raines, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960).

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V. Determination of Constitutionality of Legislation

A. Power to Declare Legislation Void

1. In General

§ 110. Exercise of power to determine constitutionality of law by nonjudicial agencies; judicial power as exclusive

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 955, 961

Individuals are not empowered to determine whether the law is constitutional; that duty belongs to the judiciary.[1]

From the very nature of the American system of government with constitutions prescribing the jurisdiction and powers of each of the three branches of government, it has devolved on the judiciary to determine whether the acts of the other two departments are in harmony with the fundamental law.[2] All the departments of the government are unquestionably entitled and compelled to judge of the constitution for themselves; but, in doing so, they act under the obligations imposed in the instrument, and in the order of time pointed out by it. When the judiciary has once spoken, if the acts of the other two departments are held to be unauthorized, or in violation of the constitution or the vested rights of the citizen, they cease to be operative or binding.[3] Thus, the final responsibility of passing upon the constitutionality of a statute rests upon the courts.[4]

The right to declare an act unconstitutional is purely a judicial power and cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to support the constitution. The oath of office "to obey the Constitution" means to obey the constitution, not as the officer decides, but as judicially determined, for every law found on the statute books is presumptively constitutional until declared otherwise by the court.[5] Thus, except in carefully circumscribed situations authorized by state law or court decisions,[6] an officer of the executive department of the government has no right or power to declare an act of the legislature to be unconstitutional or to raise the question of its constitutionality without showing

that such executive officer will be injured in person, property, or rights by its enforcement.[7] Also, a legislative declaration that essentially states a given enactment is constitutional is not binding on the courts.[8]

Footnotes

1 Perlstein v. Wolk, 218 Ill. 2d 448, 300 Ill. Dec. 480, 844 N.E.2d 923 (2006).

2 Walling v. Bown, 9 Idaho 740, 76 P. 318 (1904), aff'd, 204 U.S. 320, 27 S. Ct. 292, 51 L. Ed. 503 (1907); Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938).
As to separation of powers, see §§ 234 to 330.

3 State ex rel. Atlantic Coast Line R. Co. v. State Bd. of Equalizers, 84 Fla. 592, 94 So. 681, 30 A.L.R. 362 (1922); State ex rel. Suddoth v. Tann, 172 Miss. 162, 158 So. 777 (1935).

4 Parsons v. State, 251 Ala. 467, 38 So. 2d 209 (1948).

5 U.S. ex rel. Madden v. General Dynamics Corp., 4 F.3d 827, 26 Fed. R. Serv. 3d 1401 (9th Cir. 1993); Empire Sanitary Landfill, Inc. v. Com., Dept. of Environmental Resources, 546 Pa. 315, 684 A.2d 1047 (1996).

6 Insurance Com'r of State of Md. v. Equitable Life Assur. Soc. of U.S., 339 Md. 596, 664 A.2d 862 (1995).

7 State ex rel. Atlantic Coast Line R. Co. v. State Bd. of Equalizers, 84 Fla. 592, 94 So. 681, 30 A.L.R. 362 (1922); Payne & Butler v. Providence Gas Co., 31 R.I. 295, 77 A. 145 (1910).
As to whether public officers may challenge the constitutionality of legislation, generally, see § 152.

8 State ex rel. Pension Obligation Bond Com. v. All Persons Interested etc., 152 Cal. App. 4th 1386, 62 Cal. Rptr. 3d 364 (3d Dist. 2007).

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V. Determination of Constitutionality of Legislation

A. Power to Declare Legislation Void

1. In General

§ 111. Courts possessing power to determine constitutionality of legislation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 961

Where the issue is whether particular legislation conforms with, or contravenes, a state constitution, ordinarily all courts within the state have the power and duty to determine the matter,[1] but the court of last resort of the state is the final arbiter.[2] The state supreme court is the final arbiter of the state constitution[3] and may interpret state constitutional provisions more broadly than corresponding provisions of the Federal Constitution.[4] Only a court of competent jurisdiction has the power of judicial review and the solemn responsibility to strike down a statute that runs afoul of either the Federal or State Constitution.[5] The federal courts, as a general rule, are inclined to refrain from passing upon the conformity of legislation with a state constitution[6] since they are usually concerned only with whether state legislation offends the Federal Constitution.[7] Acts of state governors, however, are reviewable in the lower federal courts, as well as in the United States Supreme Court.[8]

Observation:

Striking down an Act of Congress is the gravest and most delicate duty that the Supreme Court is called on to perform, and it does not do so lightly.[9]

In the United States, federal constitutional issues can be litigated not only in the federal courts but also in the state courts.[10] In fact, state judges have a separate duty to respect and adjudicate claims where they are based on federal constitutional rights said to be protected from state impingement,[11] and an argument that a state's supreme court will not adequately safeguard federal constitutional rights has been squarely rejected by the United States Supreme Court.[12] State courts have the solemn responsibility equally with the federal courts to safeguard constitutional rights.[13] Moreover, state courts, equally and concurrently with the federal courts, bear the duty and obligation to enforce and protect every right granted and secured by the Constitution of the United States.[14] It is the duty of the state courts as much as of the federal courts, when the question of the validity of a state statute is necessarily involved as being in alleged violation of any provision of the Federal Constitution, to decide that question and to hold the law void if it violates that instrument.[15] Of course, the United States Supreme Court is the authoritative and final arbiter of the interpretation and scope of federal constitutional provisions.[16]

Footnotes

1 State ex rel. Bowman v. Board of Com'rs of Allen County, 124 Ohio St. 174, 9 Ohio L. Abs. 285, 10 Ohio L. Abs. 125, 177 N.E. 271 (1931).
As to the caution observed by courts other than those of last resort in determining the constitutionality of a statute, see § 115.

2 Duquette v. Warden, New Hampshire State Prison, 154 N.H. 737, 919 A.2d 767 (2007).

3 1A Auto, Inc. v. Director of Office of Campaign and Political Finance, 480 Mass. 423, 105 N.E.3d 1175 (2018), cert. denied, 139 S. Ct. 2613, 204 L. Ed. 2d 263 (2019).

4 State v. Decosimo, 555 S.W.3d 494 (Tenn. 2018), cert. denied, 139 S. Ct. 817, 202 L. Ed. 2d 577 (2019).

5 In re Pub. L.2001, Chapter 362, 186 N.J. 368, 895 A.2d 1128 (2006).

6 Pullman Co. v. Knott, 235 U.S. 23, 35 S. Ct. 2, 59 L. Ed. 105 (1914).
As to supremacy of federal court decisions, see § 57.
As to the jurisdiction of and relationship between federal and state courts, see Am. Jur. 2d, Courts §§ 87 to 89.
As to the jurisdiction and powers of federal courts, see Am. Jur. 2d, Federal Courts §§ 10 to 16.
As to the jurisdiction and powers of United States Supreme Court, see Am. Jur. 2d, Federal Courts §§ 452 to 489.

7 Liquor Store v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949).

8 Cooper v. Aaron, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5, 3 L. Ed. 2d 19, 79 Ohio L. Abs. 452, 79 Ohio L. Abs. 462 (1958).

9 Shelby County, Ala. v. Holder, 570 U.S. 529, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013).

10 Doremus v. Board of Ed. of Borough of Hawthorne, 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952); Voters for Responsible Retirement v. Board of Supervisors, 8 Cal. 4th 765, 35 Cal. Rptr. 2d 814, 884 P.2d 645 (1994).

11 Moran v. State, 644 N.E.2d 536 (Ind. 1994).

12 Hirsh v. Justices of Supreme Court of State of Cal., 67 F.3d 708 (9th Cir. 1995).

13 Burt v. Titlow, 571 U.S. 12, 134 S. Ct. 10, 187 L. Ed. 2d 348 (2013).

14 Irvin v. Dowd, 359 U.S. 394, 79 S. Ct. 825, 3 L. Ed. 2d 900 (1959); Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A.L.R. 406 (1935); Betts v. Easley, 161 Kan. 459, 169 P.2d 831, 166 A.L.R. 342 (1946).

15 Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 97 S. Ct. 599, 50 L. Ed. 2d 514 (1977); Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945).

16 State v. Schiefelbein, 230 S.W.3d 88 (Tenn. Crim. App. 2007).

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V. Determination of Constitutionality of Legislation

A. Power to Declare Legislation Void

2. Nature of Power

§ 112. Judicial power to determine constitutionality of legislation imposes obligatory duty

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West's Key Number Digest

West's Key Number Digest, Constitutional Law 961

Since a constitution must be obeyed by the judiciary as well as the other departments of government, and the judges are sworn to support its provisions,[1] courts are not at liberty to overlook or disregard its commands,[2] or countenance evasions thereof.[3] It is their duty in authorized proceedings to give effect to the existing constitution[4] and to obey all constitutional provisions, irrespective of their opinion as to the wisdom[5] or desirability of such provisions, and irrespective of the consequences.[6] Thus, it is said that the courts should be,[7] and are, alert to enforce the provisions of the constitution and guard against their infringement by legislative fiat or otherwise.[8]

If a statute violates a mandatory provision of the constitution, the court is required to declare such an act unconstitutional and void.[9] The duty of a court in a proper case to declare a law unconstitutional cannot be declined and must be performed in accordance with the deliberate judgment of the tribunal before which the validity of the enactment is directly drawn into question.[10]

Once it is determined that a statute encroaches on constitutional limitations, the judicial department must not hesitate in condemning it.[11] Thus, there rests upon the courts the affirmative duty of refusing to sustain that which by the constitution has been declared repugnant to public policy,[12] and of supporting, protecting, and defending the constitution by giving effect to the provisions of the constitution, even if in so doing a statute is held to be inoperative.[13] This duty of the courts to maintain the constitution as the fundamental law of the state cannot be evaded.[14]

Footnotes

1 U.S. v. Fisher, 6 U.S. 358, 2 L. Ed. 304, 1805 WL 1072 (1805); Pacific Live Stock Co. v. Ellison Ranching Co., 46 Nev. 351, 213 P. 700 (1923).

2 Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 4 L. Ed. 629, 1819 WL 2201 (1819).

3 Williams v. Louisiana, 103 U.S. 637, 26 L. Ed. 595, 1880 WL 18940 (1880).

4 Balzano v. Traeger, 93 Cal. App. 640, 270 P. 249 (2d Dist. 1928).

5 Lake County v. Rollins, 130 U.S. 662, 9 S. Ct. 651, 32 L. Ed. 1060 (1889).
As to the immateriality of the wisdom of legislation to any determination of its constitutionality, see § 185.

6 State ex rel. Davis v. City of Largo, 110 Fla. 21, 149 So. 420 (1933); Dalton v. State Property and Buildings Commission, 304 S.W.2d 342 (Ky. 1957).

7 People v. Bogdanoff, 254 N.Y. 16, 171 N.E. 890, 69 A.L.R. 1378 (1930).

8 Craig v. Board of Ed. of City of New York, 173 Misc. 969, 19 N.Y.S.2d 293 (Sup 1940), order aff'd, 262 A.D. 706, 27 N.Y.S.2d 993 (1st Dep't 1941).

9 Brown v. State, 171 Md. App. 489, 910 A.2d 571 (2006).

10 Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A.L.R.2d 441 (1948); American Toll Bridge Co. v. Railroad Commission of California, 307 U.S. 486, 59 S. Ct. 948, 83 L. Ed. 1414 (1939); State v. Simmons, 714 N.W.2d 264 (Iowa 2006) (the court has an obligation to determine whether a challenged law violates the state's constitutional equality provision).

11 Byers v. Board of Sup'rs of San Bernardino County, 262 Cal. App. 2d 148, 68 Cal. Rptr. 549 (4th Dist. 1968).

12 Local No. 234 of United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada v. Henley & Beckwith, Inc., 66 So. 2d 818 (Fla. 1953).

13 State v. Butler, 70 Fla. 102, 69 So. 771 (1915).

14 Grasse v. Dealer's Transport Co., 412 Ill. 179, 106 N.E.2d 124 (1952).

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

V. Determination of Constitutionality of Legislation

A. Power to Declare Legislation Void

2. Nature of Power

§ 113. Judicial power to determine constitutionality of legislation as solemn responsibility

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 961

The exercise of the right and power of judicial tribunals to declare whether enactments of the legislature exceed constitutional limitations and are invalid is one of the highest functions and authorities of the courts.[1] It involves a grave responsibility[2] and a solemn duty,[3] and is at all times a matter of much delicacy.[4] By way of contrast, however, courts also have a solemn duty to avoid passing upon the constitutionality of any law unless compelled to do so by an issue being squarely presented to and confronting the court in a particular case.[5] Thus, courts should endeavor to implement the legislative intent of statutes and should avoid constitutional issues wherever possible.[6]

CUMULATIVE SUPPLEMENT

Cases:

Once the legislative branch has exercised its authority to enact a statute, whether through legislative referendum or a bill signed by the Governor, it is within the courts inherent power to interpret the constitutionality of that statute when called upon to do so. Driscoll v. Stapleton, 2020 MT 247, 473 P.3d 386 (Mont. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Panitz v. District of Columbia, 112 F.2d 39 (App. D.C. 1940).
A court's adherence to the principle that Acts of Congress are presumptively constitutional is guided by the court's understanding that when it is required to pass on the constitutionality of an Act of Congress, the court assumes the gravest and most delicate duty it is called on to perform. U.S. ex rel. Madden v. General Dynamics Corp., 4 F.3d 827, 26 Fed. R. Serv. 3d 1401 (9th Cir. 1993).

2 Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963); U.S. v. Raines, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960).

3 McCray v. U.S., 195 U.S. 27, 24 S. Ct. 769, 49 L. Ed. 78 (1904).

4 U.S. v. Raines, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960).

5 State v. Watkins, 676 So. 2d 247 (Miss. 1996).

6 In re SRBA Case No. 39576, 128 Idaho 246, 912 P.2d 614 (1995).

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V. Determination of Constitutionality of Legislation

A. Power to Declare Legislation Void

3. Judicial Restraint in Exercising Power

§ 114. Judicial restraint in exercising power to determining constitutionality of legislation, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 961, 969

The courts exercise the power to declare legislation unconstitutional with great restraint.[1] The courts invariably give the most careful consideration to questions involving the interpretation and application of the constitution[2] and approach constitutional questions with great deliberation,[3] exercising their power in this respect with the greatest possible caution[4] and even reluctance.[5] The court's power to declare a statute or ordinance unconstitutional is tempered by the court's respect for the legislative process.[6] Courts rule against the constitutionality of a statute only as a last resort,[7] when the legislation under review is in palpable conflict with some plain provision of the constitution.[8]

When a federal court is asked to answer a constitutional question, the basic tenets of judicial restraint and separation of powers call upon it first to consider alternative grounds for resolution.[9] A long-standing, widespread practice is not, as such, immune from constitutional scrutiny, but neither is it to be lightly brushed aside, and this is particularly so when the constitutional standard is as amorphous as the word "reasonable" and when customary and contemporary norms necessarily play a large role in the constitutional analysis.[10] At the same time, there is no valid reason why a court, if it has jurisdiction of a constitutional question, should refuse to decide the question merely because it has some discretion in the matter whether to do so or not.[11] Furthermore, a court will not hesitate to decide the constitutionality of a statute where all other avenues of relief available to a party to the action are, at most, speculative.[12]

Observation:

Although the political process may serve as a corrective tool for legislative excesses, the court will not approve patently unconstitutional legislation merely because the political process could correct it.[13]

CUMULATIVE SUPPLEMENT

Cases:

Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law. McKesson v. Doe, 141 S. Ct. 48 (2020).

[END OF SUPPLEMENT]

Footnotes

1 Larimore Public School District No. 44 v. Aamodt, 2018 ND 71, 908 N.W.2d 442, 352 Ed. Law Rep. 1159 (N.D. 2018).

2 State v. First State Bank of Jud, 52 N.D. 231, 202 N.W. 391 (1924).

3 Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 4 L. Ed. 629, 1819 WL 2201 (1819); State ex rel. Sathre v. Board of University and School Lands of North Dakota, 65 N.D. 687, 262 N.W. 60 (1935).

4 Dutkiewicz v. Dutkiewicz, 289 Conn. 362, 957 A.2d 821 (2008).

A court must proceed cautiously in making an Eighth Amendment constitutional judgment because, unless the court subsequently reverses it, a decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed, short of a constitutional amendment and thus a revision cannot be made in light of further experience. Rhodes v. Chapman, 452 U.S. 337, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981).

5 U.S. v. Butler, 297 U.S. 1, 56 S. Ct. 312, 80 L. Ed. 477, 102 A.L.R. 914 (1936); State v. Elder, 382 So. 2d 687 (Fla. 1980).

Courts are generally reluctant to address the constitutionality of legislation unless required to do so by the case and issues then before the court. Blanchard v. State Through Parks and Recreation Com'n, 673 So. 2d 1000 (La. 1996).

6 Ames Rental Property Ass'n v. City of Ames, 736 N.W.2d 255 (Iowa 2007).

7 Tulkisarmute Native Community Council v. Heinze, 898 P.2d 935 (Alaska 1995).

Unsettled constitutional questions should be decided only as a last resort. El Dia, Inc. v. Hernandez Colon, 963 F.2d 488 (1st Cir. 1992).

8 State v. Watkins, 676 So. 2d 247 (Miss. 1996).

Principles of judicial restraint dictated that the judiciary decline to decide whether the governor's exercise of line-item veto power, after a special session was adjourned sine die, on appropriations to the legislature for its biennial budget violated the separation-of-powers provision of the Minnesota Constitution by unconstitutionally coercing the legislature; the parties' dispute about coercion essentially asked the court

to assess, weigh, and judge the motives of coequal branches of government engaged in a quintessentially political process, and, because the legislature had access to appropriated funds that were sufficient to pay the legislature's estimated expenses and allow it to continue as an independent, functioning branch of state government, it would be able to exercise its constitutional powers under the Minnesota Constitution when it reconvened. Ninetieth Minnesota State Senate v. Dayton, 903 N.W.2d 609 (Minn. 2017).

9 Lamprecht v. F.C.C., 958 F.2d 382 (D.C. Cir. 1992).
Courts exercise great restraint when considering the constitutionality of statutes, particularly in the context of separation-of-powers issues. Reynolds v. State, 888 N.W.2d 125 (Minn. 2016).

10 Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

11 Union Interchange, Inc. v. Allen, 140 Mont. 227, 370 P.2d 492 (1962).

12 I.N.S. v. Chadha, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).

13 Stilp v. Com., 588 Pa. 539, 905 A.2d 918 (2006).

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V. Determination of Constitutionality of Legislation

A. Power to Declare Legislation Void

3. Judicial Restraint in Exercising Power

§ 115. Judicial restraint in exercising power to determining constitutionality of legislation by courts other than courts of last resort

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 961

The established principles regarding the duties of care and caution which the judiciary has imposed upon itself in exercising the judicial power to rule on the constitutionality of legislation have given rise to questions whether legislation is properly to be struck down on constitutional grounds by nisi prius and other courts of less than the highest rank. Although there seems to be no doubt that such inferior tribunals do not lack power to rule on constitutionality-of-legislation issues,[1] courts of first instance should not declare an act of the legislature unconstitutional except in rare cases involving life and liberty and where the invalidity of the act is apparent on its face.[2] In fact, a court of first instance ordinarily will assume a statute to be constitutional until otherwise determined by the higher courts (especially where the statute in question is one under which the court of last resort of the state has acted).[3] However, the question is an unsettled one, and there are holdings—which appear to be better reasoned—to the effect that the duty to determine a statute's constitutionality rests as much upon courts of the first instance as upon appellate courts.[4]

Some federal district courts have refrained from invalidating Acts of Congress, suggesting that this is more properly a function of the appellate courts.[5] Furthermore, the United States Supreme Court has suggested that a federal district court should not pronounce upon the relative constitutional authority of Congress and the executive branch unless it finds it imperative to do so.[6] At times, there is even reluctance on the part of federal courts of appeals to declare Acts of Congress unconstitutional.[7] Where a federal district court has decided a constitutional claim based on a developed factual record, a federal court of appeals

exercises plenary review of the district court's legal conclusion, but defers to the lower court's factual findings supporting that conclusion unless they are clearly erroneous.[8]

Footnotes

1 Lent v. Tillson, 140 U.S. 316, 11 S. Ct. 825, 35 L. Ed. 419 (1891).
A decision whether to give life through comity to a statute otherwise unconstitutional because it violates the separation-of-powers doctrine is one of institutional policy reserved for the Supreme Court level; nonetheless, the responsibility of the lower courts, including the court of appeals, is to follow the law, which includes the constitutional separation-of-powers doctrine, and to correct an error accordingly, even if to do so means declaring a legislative enactment unconstitutional. O'Bryan v. Hedgespeth, 892 S.W.2d 571 (Ky. 1995).
As to exercise of judicial restraint in declaring legislation unconstitutional, see § 114.

2 People v. Brian L., 17 Misc. 3d 724, 842 N.Y.S.2d 874 (N.Y. City Ct. 2007).

3 People v. Weston's Shoppers City, Inc., 68 Misc. 2d 217, 326 N.Y.S.2d 685 (County Ct. 1971), order aff'd, 30 N.Y.2d 572, 330 N.Y.S.2d 790, 281 N.E.2d 840 (1972).

4 Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).
An attack upon the constitutionality of a statute must first be presented in a trial court. Williams v. State, Dept. of Health and Hospitals, 671 So. 2d 899 (La. 1996).

5 U.S. v. Smith, 62 F. Supp. 594 (W.D. Mich. 1945); Thompson v. U.S., 148 F. Supp. 910 (E.D. Pa. 1957).

6 American Foreign Service Ass'n v. Garfinkel, 490 U.S. 153, 109 S. Ct. 1693, 104 L. Ed. 2d 139 (1989).

7 Kerr v. C.I.R., 326 F.2d 225 (9th Cir. 1964).

8 U.S. v. Voigt, 89 F.3d 1050 (3d Cir. 1996) (rejected on other grounds by, U.S. v. One Parcel of Real Property with Bldgs., Appurtenances and Known as 170 Westfield Drive, Located in the Town of East Greenwich, Rhode Island, 34 F. Supp. 2d 107 (D.R.I. 1999)).

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V. Determination of Constitutionality of Legislation

A. Power to Declare Legislation Void

3. Judicial Restraint in Exercising Power

§ 116. Avoidance of unnecessary decisions determining constitutionality of legislation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 961, 969

While most courts will not refuse to pass on the constitutionality of statutes in any proceeding in which such a determination is necessarily involved,[1] they will not make a ruling on a matter of constitutional law where there is a lack of this necessary involvement[2] or where some other basis for a decision is available.[3] A long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.[4] However, the principle of judicial restraint does not call for courts to avoid ruling on a case if an answer can only be found by resorting to constitutional analysis.[5] Thus, needless consideration of attacks on the validity of statutes and unnecessary decisions striking them down should be avoided.[6] This reluctance to decide constitutional issues except when absolutely necessary is sometimes referred to as the "doctrine of strict necessity," and flows from the unique place and character of judicial review of governmental actions for constitutionality under our American governmental structure.[7]

The invariable practice of the courts is not to consider the constitutionality of legislation unless it is imperatively required,[8] essential to the disposition of the case,[9] and unavoidable.[10] Thus, a court will inquire into the constitutionality of a statute only when and to the extent that a case before it requires entry upon that duty,[11] and only to the extent that it is essential to the protection of the rights of the parties concerned.[12]

Footnotes

1 I.N.S. v. Chadha, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983); In re Wimberly Chapel Baptist Church of Osage County, 170 Kan. 684, 228 P.2d 540 (1951).

2 Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008); American Foreign Service Ass'n v. Garfinkel, 490 U.S. 153, 109 S. Ct. 1693, 104 L. Ed. 2d 139 (1989); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988); In re Snyder, 472 U.S. 634, 105 S. Ct. 2874, 86 L. Ed. 2d 504 (1985); Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985); Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 104 S. Ct. 2267, 81 L. Ed. 2d 113 (1984); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982); U. S. v. Clark, 445 U.S. 23, 100 S. Ct. 895, 63 L. Ed. 2d 171 (1980); Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979); Califano v. Yamasaki, 442 U.S. 682, 99 S. Ct. 2545, 61 L. Ed. 2d 176, 27 Fed. R. Serv. 2d 941 (1979).
The United States Supreme Court follows a policy of avoiding unnecessary adjudication of constitutional issues. U.S. v. National Treasury Employees Union, 513 U.S. 454, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995).
Federal courts should not pass on the constitutionality of an Act of Congress if a construction of the act is fairly possible by which the constitutional question can be avoided. Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 113 S. Ct. 2462, 125 L. Ed. 2d 1, 2 A.D.D. 176, 83 Ed. Law Rep. 930 (1993).

3 Federal Election Com'n v. Survival Educ. Fund, Inc., 65 F.3d 285 (2d Cir. 1995); Hyle v. Porter, 117 Ohio St. 3d 165, 2008-Ohio-542, 882 N.E.2d 899 (2008).

4 Camreta v. Greene, 563 U.S. 692, 131 S. Ct. 2020, 179 L. Ed. 2d 1118 (2011).
A fundamental and long-standing precept of doctrine of judicial restraint is that unnecessary adjudication of a constitutional issue should be avoided. Commonwealth v. Swann, 290 Va. 194, 776 S.E.2d 265 (2015).

5 Committee to Recall Robert Menendez From the Office of U.S. Senator v. Wells, 204 N.J. 79, 7 A.3d 720 (2010).

6 Communist Party, U.S.A. v. Catherwood, 367 U.S. 389, 81 S. Ct. 1465, 6 L. Ed. 2d 919 (1961); McElroy v. U.S. ex rel. Guagliardo, 361 U.S. 281, 80 S. Ct. 305, 4 L. Ed. 2d 282 (1960).

7 Citizens Nat. Bank of Evansville v. Foster, 668 N.E.2d 1236 (Ind. 1996).

8 Bush v. State of Tex., 372 U.S. 586, 83 S. Ct. 922, 9 L. Ed. 2d 958 (1963); State ex rel. Hofstetter v. Kronk, 20 Ohio St. 2d 117, 49 Ohio Op. 2d 440, 254 N.E.2d 15 (1969).
The United States Supreme Court will not pass upon questions of the constitutionality of a statute unless such adjudication is unavoidable. Rosenberg v. Fleuti, 374 U.S. 449, 83 S. Ct. 1804, 10 L. Ed. 2d 1000 (1963).

9 Marconi v. Chicago Heights Police Pension Bd., 225 Ill. 2d 497, 312 Ill. Dec. 208, 870 N.E.2d 273 (2006), as modified on denial of reh'g, (May 29, 2007).

10 Matal v. Tam, 137 S. Ct. 1744, 198 L. Ed. 2d 366 (2017); Rosenberg v. Fleuti, 374 U.S. 449, 83 S. Ct. 1804, 10 L. Ed. 2d 1000 (1963); U.S. v. Hayman, 342 U.S. 205, 72 S. Ct. 263, 96 L. Ed. 232 (1952).

11 Alabama State Federation of Labor, Local Union No. 103, United Broth. of Carpenters and Joiners of America v. McAdory, 325 U.S. 450, 65 S. Ct. 1384, 89 L. Ed. 1725 (1945); In re Sale's Estate, 227 So. 2d 199 (Fla. 1969).

12 Greenhills Home Owners Corp. v. Village of Greenhills, 5 Ohio St. 2d 207, 34 Ohio Op. 2d 420, 215 N.E.2d 403 (1966).

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V. Determination of Constitutionality of Legislation

A. Power to Declare Legislation Void

3. Judicial Restraint in Exercising Power

§ 117. Avoidance of unnecessary decisions determining constitutionality of legislation—Different provisions of same statute; severability

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 961, 969

In exercising the power to review the constitutionality of a statute, a court is compelled to act cautiously and refrain from invalidating more of the statute than is necessary; where appropriate, a court tries to limit the solution to the problem by severing any problematic portions while leaving the remainder intact.[1] In other words, as a general rule, where a proceeding directly involves only one section of an act, it is not necessary to consider, and the court should not decide, questions raised as to the constitutionality of other provisions of the act not directly involved in the proceeding.[2] However, where an unchallenged statute or portion thereof is not severable from an unconstitutional statute or portion thereof, the former will fail, regardless of its own constitutionality.[3] Thus, one challenging the constitutionality of a statute on the basis of an objection to a part of a statute which is not involved in the case must show that the invalidity of the challenged portion renders the entire act unconstitutional or renders inoperative such portion of the act as does injuriously affect the challenger's rights.[4] For example, where an argued severance would not relieve the harm complained of, courts may refuse to allow the severance argument to prevent the court from considering the constitutionality of the challenged statute.[5]

Though it is improper to rule on the constitutionality of other statutory provisions that are not directly involved in a case, it is nonetheless a rule of construction that a court which has been requested to declare a statute unconstitutional should determine its constitutionality in the context of the whole statutory scheme of which it is a part.[6]

Footnotes

1 Arthrex, Inc. v. Smith & Nephew, Inc., 941 F.3d 1320 (Fed. Cir. 2019).

2 Brock v. Superior Court in and for Los Angeles County, 9 Cal. 2d 291, 71 P.2d 209, 114 A.L.R. 127 (1937); State ex rel. Kauer v. Defenbacher, 153 Ohio St. 268, 41 Ohio Op. 278, 91 N.E.2d 512 (1950).

3 Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994).

4 McSween v. State Live Stock Sanitary Board of Florida, 97 Fla. 750, 122 So. 239, 65 A.L.R. 508 (1929). As to the partial unconstitutionality of statutes, generally, see §§ 198 to 211.

5 Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S. Ct. 3049, 82 L. Ed. 2d 200 (1984).

6 Muskogee Urban Renewal Authority v. Excise Bd. of Muskogee County, 1995 OK 67, 899 P.2d 624 (Okla. 1995).

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V. Determination of Constitutionality of Legislation

A. Power to Declare Legislation Void

3. Judicial Restraint in Exercising Power

§ 118. Refusal to decide abstract, academic, or hypothetical constitutional questions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 961, 969

The constitutionality of a statute will not be considered and determined by the courts as a hypothetical question,[1] because constitutional questions are not to be dealt with abstractly,[2] speculatively,[3] or in the manner of an academic discussion.[4] Once a statute has been violated, however, and the person violating it alleges that it is unconstitutional, the question of its constitutionality is no longer abstract, academic, or hypothetical, and a court then properly may proceed to reach the question of its validity.[5]

Footnotes

1 U.S. v. National Dairy Products Corp., 372 U.S. 29, 83 S. Ct. 594, 9 L. Ed. 2d 561 (1963); U.S. v. Raines, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960); People of State of N. Y. v. O'Neill, 359 U.S. 1, 79 S. Ct. 564, 3 L. Ed. 2d 585 (1959).

2 Government and Civic Employees Organizing Committee, CIO v. Windsor, 353 U.S. 364, 77 S. Ct. 838, 1 L. Ed. 2d 894 (1957).

3 Kimbell v. Hooper, 164 Vt. 80, 665 A.2d 44 (1995).

4 Congress of Indus. Organizations v. McAdory, 325 U.S. 472, 65 S. Ct. 1395, 89 L. Ed. 1741 (1945); Coffman v. Breeze Corp., 323 U.S. 316, 65 S. Ct. 298, 89 L. Ed. 264 (1945).

5 U.S. v. Grace, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983).

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V. Determination of Constitutionality of Legislation

A. Power to Declare Legislation Void

3. Judicial Restraint in Exercising Power

§ 119. Refusal to anticipate constitutional issues; prematurity or unripeness

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 961, 969

Courts will not anticipate a constitutional issue in advance of the necessity of deciding it,[1] or accept constitutional issues for adjudication when the controversy is "premature."[2] For example, a deputy sheriff's due process claim, in which the deputy sheriff alleged that the placement of a letter of reprimand in the deputy sheriff's file denied the deputy sheriff a property interest in continued employment by placing the deputy sheriff at risk of subsequent deprivation, was rendered moot when the deputy voluntarily resigned the position.[3] Likewise, the First Amendment claims of personal assistants who worked in the Illinois Disabilities Program, challenging a requirement under state law that they pay fee to any union representing them even if they did not support the union, were not ripe, where personal assistants in that program had not yet unionized, no certification elections were scheduled, and no union was trying to obtain certification through a card check program.[4]

Where a prisoner is released from prison, but the release is conditioned upon compliance with terms that significantly restrict the prisoner's freedom, a claim of unconstitutionality of the denial of an earlier release is not moot.[5]

A political party's action challenging the constitutionality of a state's ballot-access restrictions was held not moot, as the complaint was one capable of repetition yet evading review, in that so long as the challenged statutory scheme remained in effect, the party might qualify for official party status under the "coattails" provision, but could be shut out of ballot access so long as it qualified without the necessary support to meet the signature requirements.[6]

Footnotes

1 Clay v. Sun Ins. Office Limited, 363 U.S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170 (1960); U.S. v. Raines, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960); Petite v. U.S., 361 U.S. 529, 80 S. Ct. 450, 4 L. Ed. 2d 490 (1960).

One of the cardinal rules governing federal courts is never anticipate a question of constitutional law in advance of any necessity of deciding it. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985).

A challenge by a state political party and its executive committee to determine whether a statute requiring open primary elections infringed on their First Amendment right of association was not ripe for judicial review; the issue was not purely legal, as the party never implemented the existing statute, and the party admitted that it was unaware of any primary voters who did not intend to support the party's nominees. Mississippi State Democratic Party v. Barbour, 529 F.3d 538 (5th Cir. 2008).

As to limiting the breadth of investigation and decision of constitutional issues, see § 127.

2 Covington Court, Ltd. v. Village of Oak Brook, 77 F.3d 177 (7th Cir. 1996); Gutierrez-Rogue v. I.N.S., 954 F.2d 769 (D.C. Cir. 1992); Rhodes v. State Through Dept. of Transp. and Development, 674 So. 2d 239 (La. 1996); In re Initiative Petition No. 363, State Question No. 672, 1996 OK 122, 927 P.2d 558 (Okla. 1996); Snohomish County v. Anderson, 124 Wash. 2d 834, 881 P.2d 240 (1994).

3 Smith v. Board of County Com'rs of County of Sublette, 891 P.2d 88 (Wyo. 1995).

4 Harris v. Quinn, 573 U.S. 616, 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014).

5 Jago v. Van Curen, 454 U.S. 14, 102 S. Ct. 31, 70 L. Ed. 2d 13 (1981).

Similarly, the transfer of a state prisoner to another facility did not moot the prisoner's damages claim with respect to having allegedly been placed in solitary confinement without notice or hearing. Boag v. MacDougall, 454 U.S. 364, 102 S. Ct. 700, 70 L. Ed. 2d 551 (1982).

6 Libertarian Party of Maine v. Diamond, 992 F.2d 365 (1st Cir. 1993).

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V. Determination of Constitutionality of Legislation

A. Power to Declare Legislation Void

3. Judicial Restraint in Exercising Power

§ 120. The substantiality doctrine in determining constitutionality of legislation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 961, 969

Federal courts are without power to entertain claims otherwise within their jurisdiction if they are so attenuated and insubstantial as to be absolutely devoid of merit.[1] A claim is insubstantial only if its unsoundness so clearly results from the previous decisions as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.[2] Thus, trial courts are well advised to weigh the circumstances and appraise the substantiality of the reasons advanced in support of the enactment of legislation when its constitutionality is under attack.[3] However, where a class of activities is within the reach of federal regulation, such as through the commerce clause, courts have no power to excise individual instances as trivial.[4] For instance, the fact that pleadings do not state a claim does not compel the conclusion that the pleadings are insubstantial and therefore subject to dismissal by a district court for lack of jurisdiction without convening a three-judge district court panel, in an action challenging the constitutionality of the apportionment of congressional districts.[5]

Caution:

The substantiality doctrine as a statement of jurisdictional principles affecting the power of the federal courts to adjudicate constitutional claims has been questioned,[6] and was characterized in one case as "more ancient than analytically sound."[7]

Footnotes

1 Hagans v. Lavine, 415 U.S. 528, 94 S. Ct. 1372, 39 L. Ed. 2d 577 (1974).

2 Goosby v. Osser, 409 U.S. 512, 93 S. Ct. 854, 35 L. Ed. 2d 36 (1973).

3 U.S. v. Scott, 195 F. Supp. 440 (D.N.D. 1961).

4 Coca-Cola Co. v. Stewart, 621 F.2d 287, 29 Fed. R. Serv. 2d 1562 (8th Cir. 1980).

5 Shapiro v. McManus, 136 S. Ct. 450, 193 L. Ed. 2d 279 (2015) (abrogating *Duckworth v. State Admin. Bd. of Election Laws,* 332 F.3d 769 (4th Cir. 2003)).

6 Bell v. Hood, 327 U.S. 678, 66 S. Ct. 773, 90 L. Ed. 939, 13 A.L.R.2d 383 (1946).

7 Rosado v. Wyman, 397 U.S. 397, 90 S. Ct. 1207, 25 L. Ed. 2d 442, 13 Fed. R. Serv. 2d 375 (1970).

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V. Determination of Constitutionality of Legislation

A. Power to Declare Legislation Void

3. Judicial Restraint in Exercising Power

§ 121. The abstention doctrine in determining constitutionality of legislation

Topic Summary | Correlation Table | References

West's Key Number Digest

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Abstention is a judicially created doctrine under which a federal court will decline to exercise its jurisdiction so that a state court or state agency will have the opportunity to decide the matters at issue.[1] Where a party has a choice between state and federal courts and chooses the federal court, the federal court may, under one version of abstention, order a stay of the proceedings, on the ground that if unsettled questions of state law are first decided, the settlement of those questions might end the controversy, and that therefore the decision of the federal questions involved should be deferred until the state law questions are decided in a state court.[2]

Federal courts have the power to refrain from hearing:[3]

- Cases that would interfere with pending state criminal proceedings or with certain types of state civil proceedings
- Cases in which the resolution of a federal constitutional question might be obviated if state courts were given the opportunity to interpret an ambiguous state law
- Cases raising issues intimately involved with the states' sovereign prerogative, proper adjudication of which might be impaired by unsettled questions of state law
- Cases whose resolution by a federal court might unnecessarily interfere with a state system for the collection of taxes

• Cases which are duplicative of a pending state proceeding

Where a state statute or ordinance is challenged in a federal court as violating the Federal Constitution, but it has not yet been construed by the state courts, the proper procedure is for the federal court to hold the case in abeyance until the parties can secure from the state courts a decision upon the controlling question of state law.[4] However, the abstention doctrine is inapplicable where no state court ruling on local law can settle the federal constitutional questions involved in the case,[5] where a state court has already passed on the state issues involved.[6]

A facial challenge to the constitutionality of a statute or ordinance regulating speech may be permitted as an exception to the abstention doctrine, even though the government authority is thus deprived of the chance to obtain a construction from a state court which would render the statute constitutional or to establish a local practice which would show it to be constitutional.[7] In addition, when the unconstitutionality of a particular state action under challenge is clear, a federal court need not abstain from addressing the constitutional issue pending state court review.[8] It has further been said that the abstention doctrine rarely should be invoked, because federal courts have a "virtually unflagging obligation" to exercise the jurisdiction given them.[9]

Footnotes

1 Am. Jur. 2d, Federal Courts § 1003.

2 Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996).

3 Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996).

4 Bankers Life and Cas. Co. v. Crenshaw, 486 U.S. 71, 108 S. Ct. 1645, 100 L. Ed. 2d 62 (1988).

5 Video Software Dealers Ass'n v. Webster, 968 F.2d 684 (8th Cir. 1992).

6 Johnson v. De Grandy, 512 U.S. 997, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994).

7 City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).

8 Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986) (overruled on other grounds by, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)).

9 Ankenbrandt v. Richards, 504 U.S. 689, 112 S. Ct. 2206, 119 L. Ed. 2d 468 (1992).

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V. Determination of Constitutionality of Legislation

A. Power to Declare Legislation Void

3. Judicial Restraint in Exercising Power

§ 122. Judicial unwillingness to adjudicate constitutional issues considered to be "political questions"

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 961, 969

A.L.R. Library

Construction and Application of Political Question Doctrine by State Courts, 9 A.L.R.6th 177
Application of Political Question Doctrine by U.S. Supreme Court, 75 A.L.R. Fed. 2d 1

Forms

Forms relating to failure to state justiciable controversy, see Am. Jur. Pleading and Practice Forms, Federal Practice and Procedure [Westlaw®(r) Search Query]

The United States Supreme Court has on a number of occasions refused to review constitutional issues where it concluded that the controversies were "political questions." However, there should be no dismissal for nonjusticiability on the ground of the

presence of a political question, unless a case involves (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department, (2) a lack of judicially discoverable and manageable standards for resolving it, (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion, (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government, (5) an unusual need for unquestioning adherence to a political decision already made, or (6) the potentiality for embarrassment from multifarious pronouncements by various departments on one question.[1]

Nonjusticiable "political questions" include—

— whether a particular form of government violates the guarantee of a republican form of government.[2]

— whether amendments to the Federal Constitution have been properly ratified.[3]

— whether a period of hostilities exist in which the United States is involved.[4]

— whether a particular group of Indians should be recognized as a tribe.[5]

— whether the United States Senate's rules for trying impeachment cases are appropriate and constitutional.[6]

In determining if a question is a political question, the appropriateness under our system of government of attributing finality to the action of the political department and also the lack of satisfactory criteria for judicial determination are dominant considerations.[7] Also, there will be a "political question" where "the need for finality in the political determination" is "dominant."[8]

Observation:

Since 1962, it is unlikely that suits against the states by either the United States or private parties raising constitutional issues are to be avoided as "political questions," for in that year the Supreme Court explained that the "political question" of abstention was a response to the doctrine of separation of powers applicable in the case of coordinate branches of the federal government. The court stated that it is the relationship between the judiciary and the coordinate branches of the federal government, and not the federal judiciary's relationship to the states, which gives rise to the "political question" of abstention, adding that the nonjusticiability of a political question is primarily a function of the separation of powers. Whether a state legislature has been malapportioned is thus a justiciable question rather than a political question, the Supreme Court has held, observing that the mere fact that the suit seeks protection of a political right does not mean it presents a political question.[9] In another case, the Court has said that no political question is presented by the claim that congressional districts are malapportioned in a state.[10] In addition, the political gerrymandering of congressional districts is not a political question, and the courts may therefore hear such cases.[11]

A district court had subject matter jurisdiction in a former employee's lawsuit alleging wrongful termination in violation of public policy under state law, on the basis that the former employer terminated the former employee for refusing to engage in actions that the former employee believed would violate the law and clearly mandated public policy; the former employee's petition did not raise nonjusticiable political questions because it did not challenge the merits or the circumstances of the governmental

decision to suspend the former employee's security clearance and access.[12] Similarly, a civil rights action brought by a state senator and several voters in the senator's district, challenging the state senate's resolution expelling the senator, as violative of the First and Fourteenth Amendments, did not present a nonjusticiable political question, as would divest the district court of jurisdiction; the issues involved the relationship between the federal and a state government, not coordinate, coequal branches.[13]

Footnotes

1 Davis v. Bandemer, 478 U.S. 109, 106 S. Ct. 2797, 92 L. Ed. 2d 85 (1986).

2 § 683.

3 Coleman v. Miller, 307 U.S. 433, 59 S. Ct. 972, 83 L. Ed. 1385, 122 A.L.R. 695 (1939).

4 Commercial Trust Co. of New Jersey v. Miller, 262 U.S. 51, 43 S. Ct. 486, 67 L. Ed. 858 (1923).

5 U.S. v. "Old Settlers," 148 U.S. 427, 13 S. Ct. 650, 37 L. Ed. 509 (1893).

6 Nixon v. U.S., 506 U.S. 224, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993).

7 Coleman v. Miller, 307 U.S. 433, 59 S. Ct. 972, 83 L. Ed. 1385, 122 A.L.R. 695 (1939).

8 Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

9 Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

10 Wesberry v. Sanders, 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964).

11 Davis v. Bandemer, 478 U.S. 109, 106 S. Ct. 2797, 92 L. Ed. 2d 85 (1986).

12 Dubuque v. Boeing Company, 325 F.R.D. 296 (E.D. Mo. 2018), aff'd, 917 F.3d 666 (8th Cir. 2019).

13 Monserrate v. New York State Senate, 695 F. Supp. 2d 80 (S.D. N.Y. 2010), aff'd, 599 F.3d 148 (2d Cir. 2010).

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A. Power to Declare Legislation Void

3. Judicial Restraint in Exercising Power

§ 123. Judicial unwillingness to adjudicate constitutional issues considered to be "political questions"—Foreign affairs

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 961, 969

A.L.R. Library

Application of Political Question Doctrine by U.S. Supreme Court, 75 A.L.R. Fed. 2d 1

Forms

Forms relating to failure to state justiciable controversy, see Am. Jur. Pleading and Practice Forms, Federal Practice and Procedure [Westlaw®(r) Search Query]

Controversies involving presidential and congressional handling of foreign affairs have often been deemed "political questions" not proper for judicial review. Thus, the Supreme Court will not decide whether a representative of a foreign government with

whom the United States deals in making a treaty is the proper representative of the foreign government.[1] It also will not review an executive decision on whether an individual is the proper representative of a foreign nation.[2] The determination whether a new nation should be recognized is not proper for judicial review.[3] Whether a state of war exists between two foreign countries is for the Executive to decide, not the courts.[4] Additionally, the Supreme Court will not resolve the question whether a treaty had been broken.[5] The Supreme Court has refused to review the President's discretion not to award a license for foreign air flights by American firms.[6]

Observation:

Notwithstanding the foregoing older cases, the Supreme Court has more recently remarked that it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.[7] In addition, the Supreme Court has jurisdiction to hear a suit seeking mandamus to require the Secretary of Commerce to certify that a particular foreign nation has exceeded international whaling quotas, despite the fact that the decision involves a political question.[8] Also, prudential considerations did not dictate that taxpayers, who had a basis for constitutional standing, should be denied standing to bring a suit challenging, as a violation of the establishment clause, the appropriation and expenditure of public funds for the construction, maintenance, and operation of religious schools abroad pursuant to the American Schools and Hospitals Abroad (ASHA) program, even though the plaintiffs' claims implicated "the sensitive area of foreign affairs."[9]

Footnotes

1 Doe v. Braden, 57 U.S. 635, 16 How. 635, 14 L. Ed. 1090, 1853 WL 7680 (1853).

2 In re Baiz, 135 U.S. 403, 10 S. Ct. 854, 34 L. Ed. 222 (1890).

3 U.S. v. Palmer, 16 U.S. 610, 4 L. Ed. 471, 1818 WL 2444 (1818).

4 The Divina Pastora, 17 U.S. 52, 4 L. Ed. 512, 1819 WL 2183 (1819).

5 Ware v. Hylton, 3 U.S. 199, 3 Dall. 199, 1 L. Ed. 568, 1796 WL 882 (1796).

6 Chicago & Southern Air Lines v. Waterman S. S. Corp., 333 U.S. 103, 68 S. Ct. 431, 92 L. Ed. 568 (1948).

7 Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

8 Japan Whaling Ass'n v. American Cetacean Soc., 478 U.S. 221, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986).

9 Dornan v. U.S. Secretary of Defense, 676 F. Supp. 6 (D.D.C. 1987), order aff'd, 851 F.2d 450 (D.C. Cir. 1988).

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A. Power to Declare Legislation Void

3. Judicial Restraint in Exercising Power

§ 124. Judicial unwillingness to adjudicate constitutional issues considered to be "political questions"—The act of state doctrine

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West's Key Number Digest

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Modern status of the Act of State Doctrine, 12 A.L.R. Fed. 707

Forms

Forms relating to failure to state justiciable controversy, see Am. Jur. Pleading and Practice Forms, Federal Practice and Procedure [Westlaw®(r) Search Query]

The act of state doctrine precludes American courts from inquiring into the validity of the public acts which a recognized foreign power committed within its own territory.[1] The doctrine has frequently been invoked by federal courts as a ground for refusal to hear or decide cases involving foreign nations.[2] The act of state doctrine does not establish any exception to the obligation of United States courts to decide cases and controversies even if they may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions be deemed valid.[3] It applies only to cases that would otherwise require courts to judge the validity of a foreign state's governmental acts in regard to matters within that country's borders.[4] It does not apply to cases involving the nongovernmental or private acts of an individual who happens to be a foreign government official.[5]

Footnotes

1 Am. Jur. 2d, International Law § 58.

2 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964).

3 W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Intern., 493 U.S. 400, 110 S. Ct. 701, 107 L. Ed. 2d 816 (1990).

4 Grupo Protexa, S.A. v. All American Marine Slip, a Div. of Marine Office of America Corp., 20 F.3d 1224 (3d Cir. 1994).

5 Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

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A. Power to Declare Legislation Void

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§ 125. Judicial decision based on nonconstitutional grounds when possible

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 961, 969

It is settled as a general principle that courts will not pass on the constitutionality of an Act of Congress or a state legislature if the merits of the case in hand may be fairly determined otherwise on nonconstitutional grounds.[1] In other words, if a sufficient nonconstitutional ground for a decision is available, the court must begin and end there.[2] This rule is followed even where such other grounds for decision have not been properly raised before the court by the parties, but have been raised by the court itself.[3]

If the case may be decided on either one of two grounds and one of these does not involve the constitutionality of a statute or governmental action, the court must and will decide it on that ground.[4] Thus, where a party raises both statutory and constitutional arguments in support of a judgment, ordinarily courts will first address the statutory argument in order, if possible, to avoid an unnecessary resolution of the constitutional issue.[5] This rule is applicable even if the constitutional claim can be resolved summarily whereas the nonconstitutional claim cannot be.[6] Disposition of a constitutional question must be reserved to the last.[7]

When the validity of an Act of Congress is drawn in question and a serious doubt of constitutionality is raised, the Supreme Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.[8] However, the canon of construction that federal statutes are to be construed so as to avoid serious doubts of their constitutionality does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication.[9] Furthermore, the fact

that federal courts should not decide constitutional issues unnecessarily does not permit a court to press statutory construction to the point of disingenuous evasion to avoid a constitutional question.[10]

Footnotes

1 Bond v. U.S., 572 U.S. 844, 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014); Escambia County, Fla. v. McMillan, 466 U.S. 48, 104 S. Ct. 1577, 80 L. Ed. 2d 36 (1984); Gulf Oil Co. v. Bernard, 452 U.S. 89, 101 S. Ct. 2193, 68 L. Ed. 2d 693, 31 Fed. R. Serv. 2d 509 (1981); Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980); Califano v. Yamasaki, 442 U.S. 682, 99 S. Ct. 2545, 61 L. Ed. 2d 176, 27 Fed. R. Serv. 2d 941 (1979); County Court of Ulster County, N. Y. v. Allen, 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979); New York City Transit Authority v. Beazer, 440 U.S. 568, 99 S. Ct. 1355, 59 L. Ed. 2d 587 (1979).

2 National Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124 (7th Cir. 1995).

3 Jean v. Nelson, 472 U.S. 846, 105 S. Ct. 2992, 86 L. Ed. 2d 664 (1985).

4 Escambia County, Fla. v. McMillan, 466 U.S. 48, 104 S. Ct. 1577, 80 L. Ed. 2d 36 (1984); Edward J. DeBartolo Corp. v. N.L.R.B., 463 U.S. 147, 103 S. Ct. 2926, 77 L. Ed. 2d 535 (1983).

5 Blum v. Bacon, 457 U.S. 132, 102 S. Ct. 2355, 72 L. Ed. 2d 728 (1982).

6 Meinhold v. U.S. Dept. of Defense, 34 F.3d 1469 (9th Cir. 1994).

7 Lane v. Wilson, 307 U.S. 268, 59 S. Ct. 872, 83 L. Ed. 1281 (1939); Greenhills Home Owners Corp. v. Village of Greenhills, 5 Ohio St. 2d 207, 34 Ohio Op. 2d 420, 215 N.E.2d 403 (1966).

8 U.S. v. Wells Fargo Bank, 485 U.S. 351, 108 S. Ct. 1179, 99 L. Ed. 2d 368 (1988).
The constitutionality of statutes ought not to be decided except in an actual factual setting that makes such decision necessary. Pennell v. City of San Jose, 485 U.S. 1, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988).

9 Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986).

10 Jean v. Nelson, 472 U.S. 846, 105 S. Ct. 2992, 86 L. Ed. 2d 664 (1985).

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V. Determination of Constitutionality of Legislation

A. Power to Declare Legislation Void

3. Judicial Restraint in Exercising Power

§ 126. Judicial decision based on alternative state grounds when possible

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West's Key Number Digest

West's Key Number Digest, Constitutional Law 961, 969

Within the federal system itself, the rule has been established that federal courts should avoid adjudication of federal constitutional claims when alternative state grounds are available, and that where state constitutional provisions offer more expansive protection than the Federal Constitution, then federal courts must address the state constitutional claims first in order to avoid any unnecessary consideration of federal constitutional claims.[1] State courts follow the same rule, considering state constitutional claims and issues before considering federal constitutional claims,[2] reaching the latter only if necessary.[3] Thus, a state supreme court normally addresses constitutional questions first under the state constitution and relies on federal law only to aid in its analysis.[4]

The Supreme Court also avoids constitutional decisions by vacating the decision below and remanding the case to the state court for further reflection and reconsideration.[5] Similarly, cases from federal district courts have been vacated by the Supreme Court and remanded, with instructions to hold the case until there is a definitive state ruling; the Court has expressed the view that it is federal policy not to pass on constitutional questions in situations where an authoritative interpretation of state law may avoid the constitutional issues.[6]

Observation:

Since the federal "case or controversy" jurisdictional requirement, found in Article III of the Federal Constitution, does not apply to state courts, some states have laws requiring state courts to answer "certified questions" concerning the constitutionality of certain state statutes. certified questions concerning the constitutionality of statutes almost inevitably conflict with the long-standing policy of judicial restraint in constitutional matters, since certified questions require the courts to make constitutional determinations, even though such cases could be resolved on other nonconstitutional grounds.[7]

Footnotes

1 Vernon v. City of Los Angeles, 27 F.3d 1385 (9th Cir. 1994).

2 State v. Johnson, 140 N.H. 573, 669 A.2d 222 (1995); State v. Cookman, 324 Or. 19, 920 P.2d 1086 (1996).

3 State v. Johanesen, 319 Or. 128, 873 P.2d 1065 (1994).

4 City of Keene v. Cleaveland, 167 N.H. 731, 118 A.3d 253 (2015).

5 Bush v. State of Tex., 372 U.S. 586, 83 S. Ct. 922, 9 L. Ed. 2d 958 (1963).

6 Government and Civic Employees Organizing Committee, CIO v. Windsor, 353 U.S. 364, 77 S. Ct. 838, 1 L. Ed. 2d 894 (1957).

7 Citizens Nat. Bank of Evansville v. Foster, 668 N.E.2d 1236 (Ind. 1996).

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16 Am. Jur. 2d Constitutional Law § 127

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Constitutional Law

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V. Determination of Constitutionality of Legislation

A. Power to Declare Legislation Void

3. Judicial Restraint in Exercising Power

§ 127. Court limiting breadth of investigation and decision of constitutional issues

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 961, 969

On a number of occasions, the Supreme Court of the United States has said that it will rigidly adhere to the policy never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.[1] Stated differently, in deciding constitutional issues, the Supreme Court has traditionally said that it will express its statement of constitutional principle controlling the decision in the narrowest language possible.[2] When deciding constitutional questions, federal courts must choose the narrowest constitutional path to decision.[3] This requires avoidance of "any constitutional question except with reference to the particular facts to which it is to be applied."[4]

Courts should not go beyond the issues raised in order to decide momentous constitutional questions not contained within the framework of the pleadings or the evidence in the case.[5] Similarly, they will view statutes whose constitutionality is in issue as being of a restricted scope, if decision of the constitutional question can thereby be avoided.[6] Additionally, the courts will decline as a rule to decide whether a particular provision of a statute is unconstitutional where they are of the opinion that if such provision should in fact be invalid, it may be severed from the remaining provisions of a statute, the validity of which alone is necessarily before the court.[7]

A decision sustaining the constitutionality of a statute is not decisive of its validity against subsequent attacks upon different grounds and does not preclude the court from subsequently declaring the statute unconstitutional where it is assailed upon other constitutional grounds.[8] On the other hand, the rationale of rules of practice limiting the United States Supreme Court's determination of constitutionality of statutes may disappear where (1) a particular statute has already been declared

unconstitutional in the vast majority of its intended applications and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, in a mere fraction of the cases it was originally designed to cover; or (2) a state statute comes to the Supreme Court conclusively pronounced by a state court as having an otherwise valid provision of application inextricably tied up with an invalid one; or (3) the Supreme Court can justifiably think itself able confidently to discern that Congress would not have desired its legislation to stand at all unless it could validly stand in its every application.[9]

Footnotes

1 Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008); U.S. v. Raines, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960); Tennessee Pub. Co. v. American Nat. Bank, 299 U.S. 18, 57 S. Ct. 85, 81 L. Ed. 13 (1936); State of Arizona v. State of California, 283 U.S. 423, 51 S. Ct. 522, 75 L. Ed. 1154 (1931); City of Cincinnati v. Vester, 281 U.S. 439, 50 S. Ct. 360, 74 L. Ed. 950 (1930).

2 Garner v. State of La., 368 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207 (1961).

3 Qassim v. Trump, 927 F.3d 522 (D.C. Cir. 2019).

4 Alabama State Federation of Labor, Local Union No. 103, United Broth. of Carpenters and Joiners of America v. McAdory, 325 U.S. 450, 65 S. Ct. 1384, 89 L. Ed. 1725 (1945); Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412, 57 S. Ct. 772, 81 L. Ed. 1193, 112 A.L.R. 293 (1937).
As to avoidance of constitutional issues, generally, see § 125.

5 Toyosaburo Korematsu v. U.S., 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944) (abrogated on other grounds by, Trump v. Hawaii, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018)).
It is the practice of the Supreme Court of the United States not to formulate a rule of constitutional law broader than is required by the precise facts presented in the record. Garner v. State of La., 368 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207 (1961).

6 § 176.

7 Champlin Refining Co. v. Corporation Com'n of State of Okl., 286 U.S. 210, 52 S. Ct. 559, 76 L. Ed. 1062, 86 A.L.R. 403 (1932).

8 Grasse v. Dealer's Transport Co., 412 Ill. 179, 106 N.E.2d 124 (1952).

9 U.S. v. Raines, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960).

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